
EPCO MARINE SDN. BHD.

v.

MBf FINANCE BHD.

HIGH COURT MALAYA, PULAU PINANG

ABDUL HAMID MOHAMED JC

[CIVIL SUIT NO. 22-425-89]

10 DECEMBER 1991

CIVIL PROCEDURE: *Injunction - Claim for injunction restraining the defendants from auctioning property - Order for sale given and auction date fixed - Whether defendants should proceed with auction - Issue since parties have agreed to settle mode of payment amicably.*

CIVIL PROCEDURE: *- Injunction set aside - Erinford Order pending appeal to Supreme Court - Issue of non-disclosure of material facts - Whether intention to preserve property - Adequate remedy - Delay in making application by the defendant.*

On 6 October 1989 the plaintiffs took out a writ against the defendants. In the statement of claim the plaintiffs, *inter alia*, prayed for an injunction restraining the defendants from auctioning the property held under H.S.(D) 247 Lot No. 3730 pending the outcome of the action. Prior to that, on 5 May 1986, the defendants had obtained an order for sale of the said land. After a few unsuccessful auctions, the auction was fixed again on 14 October 1989.

It was the contention of the plaintiffs that the plaintiffs and the defendants had on 7 September 1989 reached an amicable settlement with regard to the mode of payment to settle the judgment sum, and therefore the defendants should not proceed with the auction. An *ex-parte* order restraining the defendants from auctioning the said property was given on 11 October 1989.

On 9 November 1991 the defendant's application to set aside the injunction was allowed but the Court made an Erinford Order pending the appeal to the Supreme Court.

The issue before the Court was whether the plaintiffs were guilty of non-disclosure of material facts. The plaintiffs when applying for the *ex-parte* order did not disclose that they wanted or tried to sell the land themselves, which was later alleged by the defendants when applying to set aside the injunction and this was subsequently admitted by the plaintiffs.

Held:

[1] The Court found that there is a non-disclosure of a material fact, because had it been disclosed it would be apparent that the plaintiffs' intention in obtaining the injunction was not to preserve the land. On this ground alone, the injunction should be set aside without even considering the merits.

[2] It is clear from the evidence produced that the plaintiffs themselves had tried to sell the land after the order for sale was obtained. Therefore, this is not a case where the plaintiffs wanted to preserve the property. In the circumstances even if the plaintiffs were to succeed in the main suit, damages would clearly be an adequate remedy.

[Application allowed with costs.]

a Cases referred to:

Tunas (Pte.) Ltd. v. Mayer Investment Pte. Ltd. & Ors. [1989] 2 MLJ 132 (cons)

Associated Tractors Sdn. Bhd. v. Chan Boon Heng & Anor. [1990] 2 MLJ 408 (foll)

For the plaintiff - Abu Haniffa; M/s. Y.S.Woo & Proctor

For the defendant - Ooi Siew Kim; M/s. Chin Eng & Co.

b**JUDGMENT****Abdul Hamid Mohamed JC:**

c On 6 October 1989 the plaintiffs took out a writ against the defendants. In the statement of claim the plaintiffs, *inter alia*, prayed for an injunction restraining the defendants from auctioning the property held under HS (D) 247, Lot No. 3730, Bandar Tanjung Bunga, Daerah Timur Laut, Pulau Pinang pending the outcome of the action.

Prior to that, on 5 May 1986, the defendants had obtained an order for sale of the said land. After a few unsuccessful auctions, the auction was fixed again on 14 October 1989.

d It was the contention of the plaintiffs that the plaintiffs and the defendants had on 7 September 1989 reached an amicable settlement with regard to the mode of payment to settle the judgment sum. Therefore the defendants should not proceed with the auction.

On 11 October 1989, my brother Wan Adnan J made an *ex-parte* order restraining the defendants from auctioning the property.

On 27 March 1990 the defendants took out a summons-in-chambers to set aside the injunction.

e A preliminary objection was taken by the learned Counsel for the defendants. I dismissed it. On 9 November 1991 I heard the arguments of both Counsel on merits and gave my decision 5 days later. I allowed the defendants' application to set aside the injunction but I made an *Erinford* Order pending the appeal to the Supreme Court.

f The first point to be considered is whether the plaintiffs were guilty of non-disclosure of material facts. It should be noted that the plaintiffs when applying for the *ex-parte* order did not disclose that they wanted or tried to sell the land themselves. This was later alleged by the defendants when applying to set aside the injunction and subsequently admitted by the plaintiffs.

g I am of the view that this is a non-disclosure of a material fact, because, had it been disclosed, it would be apparent that the plaintiffs' intention in obtaining the injunction was not to preserve the land. Therefore, as I will show later, damages would be an adequate remedy if the plaintiffs were to succeed in the main suit.

On this ground alone, the injunction should be set aside without even considering the merits - See *Tunas (Pte) Ltd. v. Mayer Investment Pte Ltd. & Ors. [1989] 2 MLJ 132*.

h As the application was argued on other grounds as well I should also consider them and give my decision.

i Affidavits were filed by both sides supporting or refuting the contention that an amicable settlement was reached on 7 September 1989. I shall not discuss the evidence in detail. Suffice for me to say that, on affidavit evidence, the question whether an amicable settlement was reached or not is clearly a serious issue to be tried. The plaintiffs therefore had crossed the first hurdle.

However I am of the view that in the circumstances of this case, damages would be an adequate remedy to the plaintiffs. It is clear from the evidence produced by the defendants, indeed it was admitted by the plaintiffs, that the plaintiffs themselves had tried to sell the land after the order for sale was obtained. Therefore, this is not a case where the plaintiffs wanted to preserve the property. In the circumstances I am of the view that even if the plaintiffs were to succeed in the main suit, damages would clearly be an adequate remedy - See *Associated Tractors Sdn. Bhd. v. Chan Boon Heng & Anor.* [1990] 2 MLJ 408 SC. On this ground too the application should be allowed.

Learned Counsel for the plaintiffs argued that the defendants were guilty of delay in making the application. Here five months had lapsed before the application to set aside the injunction was made. I am of the view that five months is not an unduly long period. After all there is no hard and fast rule about it, though delay may be taken into account by the Court. In the circumstances of this case I do not think the defendants should be penalised on this ground alone. After all the plaintiffs themselves took over two years after the order for sale was obtained and only after a few unsuccessful auctions before taking steps to restrain the auction fixed on 14 October 1989.

On these grounds I allowed the application with costs.

Also found at [1992] 1 CLJ 676

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